

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

REARDEN LLC, et al.,  
Plaintiffs,

v.

THE WALT DISNEY COMPANY, et al.,  
Defendants.

Case No. 17-cv-04006-JST

**ORDER DENYING PLAINTIFFS’  
MOTION TO EXCLUDE PORTIONS  
OF THE EXPERT REPORT AND  
TESTIMONY OF ROBERT  
WUNDERLICH**

Re: ECF No. 431

Before the Court is Plaintiffs’ motion to exclude portions of the expert report and testimony of Robert Wunderlich. ECF No. 431. The Court will deny the motion.

**I. BACKGROUND**

The factual and procedural background of this case are summarized in greater detail in this Court’s prior orders. ECF Nos. 60, 85, 297. In short, this case concerns claims for contributory copyright infringement, vicarious copyright infringement, and trademark infringement by Plaintiffs Rearden LLC and MOVA LLC (collectively, “Rearden”) against Defendants The Walt Disney Company; Walt Disney Motion Pictures Group, Inc.; Walt Disney Pictures; Buena Vista Home Entertainment, Inc.; Marvel Studios LLC; Mandeville Films, Inc.; Infinity Productions LLC; and Assembled Productions II LLC (collectively, “Disney”). Rearden alleges that Digital Domain 3.0 (“DD3”) directly infringed Rearden’s copyright to Rearden’s MOVA Contour Reality Capture (“MOVA”)—a program for capturing the human face to create computer graphics (“CG”) characters in motion pictures. Rearden further alleges that Disney “contracted with DD3 to provide facial performance capture services using the copyrighted . . . program” to create the character Beast in its film *Beauty and the Beast* (2017). ECF No. 315 ¶ 117.

Disney has moved for summary judgment on all of Rearden’s claims in connection with

1 *Beauty and the Beast*. ECF No. 421. At trial, Disney intends to elicit testimony from its  
2 apportionment expert, Robert Wunderlich. Rearden has moved to exclude portions of Mr.  
3 Wunderlich's expert report and testimony.

## 4 **II. LEGAL STANDARD**

5 The proponent of expert testimony "has the burden of proving admissibility." *Lust ex rel.*  
6 *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996). Under Rule 702 of the  
7 Federal Rules of Evidence:

8 A witness who is qualified as an expert by knowledge, skill,  
9 experience, training, or education may testify in the form of an  
opinion or otherwise if:

- 10 (a) the expert's scientific, technical, or other specialized knowledge  
11 will help the trier of fact to understand the evidence or to  
determine a fact in issue;
- 12 (b) the testimony is based on sufficient facts or data;
- 13 (c) the testimony is the product of reliable principles and methods;  
14 and
- 15 (d) the expert has reliably applied the principles and methods to the  
facts of the case.

16 Following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), trial courts serve  
17 a "gatekeeping" role "to ensure the reliability and relevancy of expert testimony." *Kumho Tire*  
18 *Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

19 "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection  
20 to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the  
21 knowledge and experience of the relevant discipline." *Alaska Rent-A-Car, Inc. v. Avis Budget*  
22 *Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (quoting *Primiano v. Cook*, 598 F.3d 558, 565 (9th  
23 Cir. 2010)). The question "is not the correctness of the expert's conclusions but the soundness of  
24 his methodology." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).  
25 Thus, courts should "screen the jury from unreliable nonsense opinions, but not exclude opinions  
26 merely because they are impeachable." *Alaska Rent-A-Car*, 738 F.3d at 969. "Shaky but  
27 admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the  
28 burden of proof, not exclusion." *Primiano*, 598 F.3d at 564.

### 1 III. DISCUSSION

2 Rearden seeks to exclude Mr. Wunderlich's opinions on distribution overhead, production  
3 cost and overhead, and taxes.

#### 4 A. Distribution and Production

5 In his opening expert report, Mr. Wunderlich provided a chart that calculates Disney's net  
6 income after taxes for *Beauty and the Beast*, excluding consumer products and music. Mr.  
7 Wunderlich wrote in his report that he obtained these figures in from Disney's "SAP accounting  
8 system." ECF No. 430-4 at 7. He wrote that "Disney's revenues and expenses are recorded in a  
9 general ledger within" this system, and that entries in the system "include reference fields that  
10 enable tracing the recorded amounts to invoices and other supporting documentation." *Id.* He  
11 further explained that these records are "audited on a regular basis by . . .  
12 PricewaterhouseCoopers" ("PwC"), and that PwC "audits the internal controls Disney has in place  
13 regarding . . . access to and the entry of data into the accounting system." *Id.* He also wrote that  
14 revenues from *Beauty and the Beast* were "subject to audit by the various guilds," that production  
15 costs "were subject to audit by production incentive authorities" in the New York, the United  
16 Kingdom, and Canada. *Id.* at 8. He noted that records in this system "are compiled to create the  
17 financial statements that Disney uses in its SEC reporting." *Id.* Mr. Wunderlich stated that he  
18 spoke with five Disney representatives about the expenses, including Disney's 30(b)(6) witness on  
19 financial topics. *Id.* at 6.

20 In his deposition, Mr. Wunderlich testified that the numbers in the chart "came from" the  
21 documents from Disney's system. ECF No. 430-5 at 2. He testified that he did not obtain the  
22 underlying data or figures as to certain calculations, such as Disney's 10% of gross revenue  
23 allocation to "distribution overhead," but that he understood the underlying process as relayed by  
24 Disney's representatives. ECF No. 430-5 at 5. He testified that he also did not know the  
25 breakdown of overhead expenses by category of expense. *See id.* at 8. Similarly, with respect to  
26 production costs and interest, Mr. Wunderlich testified that he did not ask Disney's representatives  
27 for "supporting documentation to support the production overhead amount," *id.* at 12, and that he  
28 could not break production costs down by category, *id.* at 13–14.

1 Rearden argues that Mr. Wunderlich’s expert report is unsubstantiated because he  
2 “performed no analysis to confirm” Disney’s record of approximately \$102 million in distribution  
3 overhead and \$22 million in production overhead and interest. ECF No. 431-1 at 9. Disney  
4 responds that Mr. Wunderlich adequately explained his reasoning insofar as he wrote that he  
5 reviewed the documents from the SAP accounting system, “pointed to several independent signs  
6 of accuracy that validated Disney’s financial records and accounting system,” and interviewed  
7 four Disney employees about these figures. ECF No. 441 at 9.

8 The relevant question is whether Mr. Wunderlich relied on the kind of facts or data upon  
9 which experts in his field reasonably rely. *Stiles v. Walmart, Inc.*, 639 F. Supp. 3d 1029, 1057  
10 (E.D. Cal. 2022) (citing Fed. R. Evid. 703). He appears to have done so. There is no requirement  
11 in the caselaw that an expert independently verify the figures contained in the records on which  
12 the expert relies. To the contrary, the First Circuit has expressly rejected the notion that an expert  
13 is “obligated, as a condition of admissibility to present invoices, statements, documents,  
14 breakdown or . . . supporting data to support” the data about which the expert will testify. *Int’l*  
15 *Adhesive Coating Co., Inc., v. Bolton Emerson Intnt’l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988)  
16 (internal quotation marks omitted); accord *Tormenia v. First Investors Realty Co.*, 251 F.3d 128,  
17 135 (3d Cir. 2000) (noting that an expert is not required to “eschew reliance on [a party’s] account  
18 of factual events”). In so concluding, the First Circuit wrote that such arguments against  
19 admissibility “are simply a rehashing of the central factual disputes of the case dressed up as  
20 attacks on the expert’s testimony.” *Id.* This conclusion is consistent with the Ninth Circuit’s  
21 observation that “the factual basis of an expert opinion goes to the credibility of the testimony, not  
22 the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in  
23 cross-examination.” *Hangerter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.14  
24 (9th Cir. 2004) (quoting *Children’s Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir.  
25 2004))). For this reason, courts reject challenges to the admissibility of expert testimony on the  
26 ground that such testimony is predicated on a party’s business records. See, e.g., *Total Control,*  
27 *Inc. v. Danaher Corp.*, 338 F. Supp. 3d 566, 570 (E.D. Pa. 2004).

**B. Taxes**

Mr. Wunderlich calculated Disney's income taxes attributable to *Beauty and the Beast* each year at the applicable federal corporate tax rates for that year. ECF No. 430-4. He further wrote that the approach is "appropriate because, even if Disney corporate-wide pays a lesser or greater rate due to particular losses or gains in other part of the corporation, *Beauty and the Beast* . . . would not share in those los[s]es or gains." ECF No. 430-4 at 12.

Rearden argues that Mr. Wunderlich's deduction of taxes from gross revenue "should be stricken because it is irrelevant and contrary to the law." ECF No. 431-1 at 9. Disney argues that Mr. Wunderlich's opinion is admissible because Rearden's "real dispute is that Disney's internal tax accounting methodology is flawed." ECF No. 440-2 at 13.

The parties do not dispute that Disney is only entitled to deduct the taxes it "actually paid." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 488 (9th Cir. 2000), *overruled on other grounds by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020)). Mr. Wunderlich merely recites the method he used to determine what Disney actually paid in connection with *Beauty and the Beast*, and he opines as to why he deems the approach to be reasonable. Rearden does not argue why the method Wunderlich used is inappropriate for the purposes of measuring a company's taxes attributable to a particular product, but instead argues that such treatment is wrong because Disney, as a corporation, "only pays one tax rate." ECF No. 469-3 at 9. None of the cases relied upon by Rearden disapproves of Mr. Wunderlich's method of determining the amount a company actually paid. There is one Ninth Circuit case on the subject, *Three Boys Music Corp.*, in which the Court of Appeals upheld the district court's refusal to allow Sony Music to deduct its "Net Operating Loss Carry-forward (NOL) because the NOL did not have a concrete financial impact." 212 F.3d at 488 (internal quotation marks omitted). But Disney's taxes attributable to *Beauty and the Beast* certainly had a concrete impact on Disney's net revenue from the film. Rearden has thus failed to establish that Mr. Wunderlich's calculation is contrary to law. If it wishes to contest the accuracy of Mr. Wunderlich's calculations, it can do so on cross-examination.

**C. Wunderlich's Prior Testimony**


Rearden suggests that the fact that Mr. Wunderlich's opinions have been excluded in eight other cases is relevant to the reliability of his expert report and testimony in this case. Because there is no suggestion that the opinions excluded in the prior cases are the same as the opinion Wunderlich gives here, this point is irrelevant.<sup>1</sup> Moreover, as one court observed in rejecting this same argument, "Wunderlich appears to have testified as an expert approximately 150 times . . . . Defendant does not challenge Wunderlich's qualifications, nor do [those] cases present similar questions to those here." *Brighton Collectible, LLC v. Believe Prod., Inc.*, No. 2:15-CV-00579-CAS (ASx), 2017 WL 440255, at \*8 (C.D. Cal. Jan. 30, 2017). The Court therefore does not consider these prior exclusions in determining whether Mr. Wunderlich's testimony is admissible.

**CONCLUSION**

For the reasons stated above, Rearden's motion is denied.

**IT IS SO ORDERED.**

Dated: October 13, 2023

  
JON S. TIGAR  
United States District Judge

<sup>1</sup> Rearden appears to recognize the questionable relevance of its own argument, stating, "Plaintiffs do not contend that the contested portions of Wunderlich's opinions should be excluded solely because of his poor *Daubert* history." ECF No. 431-1 at 13. But they press the argument nonetheless.